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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1959

No. 506

J. A. BOOKER, ET AL.
Petitioners

vs.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL.
Respondents

ANSWER AND BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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Generally

By-Law Governing Nominations

It is felt that the controlling point in the case can be quickly and briefly pointed out, which should immediately dispose of the Petition.

The Petition in the Superior Court and the Bill of Exceptions to the Supreme Court of Georgia alleged that a by-law providing for the manner of making nominations was unconstitutional in that it violated the 5th Amendment. Now, after the case has left the State Supreme Court the petition for certiorari does not even mention the 5th Amendment. Surely the Supreme Court of the United States will not consider

an objection under the 14th Amendment that was not considered in either of the Courts below. *Corkran Oil Co. v. Arnaudet*, 199 U.S. 182 at 193.

We think we have already disposed of the only ground on which this Honorable Court would even consider a writ of certiorari, but to clinch the point the Petitioners now are relying on the 14th Amendment for their constitutional objections and the prohibitions of the 14th Amendment have reference to State action exclusively. The by-law of the First Federal Savings and Loan Association that is being attacked admittedly has the blessings of the Federal Home Loan Bank Board (R. 18) and was adopted pursuant to an Act of Congress. It is true that sometimes a State through its Courts can violate the 14th Amendment but in this case the State Court did not alter the Petitioners' property rights in any way, but simply dismissed the Petitioners' complaint that attempted to have the by-law declared invalid.

Even if this Honorable Court were to rule that the petitioners have properly presented a constitutional objection and that the State Courts dismissal of Petitioners' attempt to get an injunction is considered a violation of the 14th Amendment, nevertheless, if the nominating by-law is Constitutional and valid, then this establishes the validity of the election and disposes of the attack on same as the incumbent Directors were the only directors nominated in accordance with the by-laws or in any other manner.

The nominating by-law under attack provides:

"NOMINATING COMMITTEE. The president, at least 30 days prior to the date of each annual meeting, shall appoint a nominating committee of three per-

sons who are members of the association. Such committee shall make nominations for directors in writing, and deliver to the secretary such written nominations at least 15 days prior to the date of the annual meeting, which nominations shall forthwith be posted in a prominent place in the home office for the 15 days' period prior to the date of the annual meeting. Provided such committee is appointed and makes such nominations, no nomination for directors except those made by the nomination committee shall be voted upon at the annual meeting unless *other nominations by members are made in writing and delivered to the secretary of the association at least* 10 *days prior to the date of the annual meeting* (emphasis added) which nominations shall forthwith be posted in a prominent place in the home office for the 10 days' period prior to the date of the annual meeting. Ballots bearing the names of all persons nominated by the nominating committee and by other members prior to the annual meeting shall be provided for use by the members at the annual meeting. If at any time the President shall fail to appoint such a nominating committee, or the nominating committee shall fail or refuse to act at least 15 days prior to the annual meeting, nominations for Directors may be made at the annual meeting by any member and shall be voted upon." (R. 14, 6).

It is admitted that these provisions were complied with. (P. for C. 8, 19).

(Note. In explanation of this reference to the record, it is taken from some typewritten sheets served upon Respondent which Respondent presumes is meant to

be the record although it contains nothing to show that it is the record. As many of the pages are not even numbered, Respondent has supplied this deficiency).

It is to be noted that although paragraph 15 of the complaint sets forth that the results of the election of the Directors was announced by the Auditor, Walter C. Askew, (R. 6, 5) petitioners nowhere set forth the tabulation to show how many votes were cast by the official proxy committee, by other proxies or in person.

It is alleged that this by-law results in "denying to members the right to vote for persons of their choice." (P. for C. 9, 10).

This unsupported conclusion is directly contrary to the plain language of the nominating by-law which provides that after the nominations have been made by the nominating committee and posted that any member may make other nominations providing they are "made in writing and delivered to the secretary of the Association at least ten days prior to the date of the annual meeting." Those attacking the by-law admit that no effort was made to comply with this provision.

One of the general demurrers sustained by the Judge of the Superior Court directly made this point.

> "Demurs generally to the said Petition and move to strike same as the Petition shows on its face that no other persons were nominated, hence any votes cast for the nominees were sufficient to elect them, there being no other names for whom a vote could be cast." (R. 18, 33).

The Judge of the Superior Court denied a temporary restraining order ruling on the validity of this by-law.

"That by-law 12 of the Association prescribing the method of nominating directors is a lawful and valid provision, and does not deny to members the right to vote for persons of their choice at annual meetings as any member could have nominated anyone as a director by conforming to reasonable provisions of the by-laws." (R. 35, 12).

The Judge then ruled on the general demurrers sustaining this ground (among others) and dismissing the Petition. The Supreme Court of Georgia likewise determined that this was a reasonable, valid and enforceable by-law as:

"The rule under attack expressly gives to each member the right to make nominations in writing to the secretary of the association at least ten days prior to the annual meeting.

"The contention that these rules are invalid as depriving the members of their right to participate in the nomination and election of the directors of the association cannot be sustained.

"It does not appear that any nominations for directors were before the meeting other than those submitted by the nominating committee." (R. 39, 30).

The by-law appears to be perfectly reasonable. Certainly nothing is advanced to show that it is against public policy. The Supreme Court of Georgia in citing *Hornady vs. Goodman*, 167 Ga. 555 (146 S.E. 173) said:

"It is a general rule that a corporation may enact any by-law for its internal management so long as

such by-laws are not contrary to its charter, a controlling statute, its articles of incorporation or violative of any general rule of public policy. Subject to the above qualifications, a Corporation may adopt by-laws regulating the calling and conduct of corporate meetings and elections of its officers." (R. 39, 17).

"On the contrary, the by-law under attack has been approved by the Central Board of the Federal Home Loan Bank. (Volume 23, No. 249 Fed. Reg. P. 98-97)." (R. 39, 27).

Even though votes may have been cast against the nominees, these were purely negative votes as not in favor of any nomination before the meeting and hence were of no effect. Any votes cast for the nominees would have been sufficient to elect them. Actually, however, the Judge of the Superior Court found that 719 unchallenged votes were cast for the nominees while there were only 649 so-called "negative votes." In addition to these 719 "unchallenged votes," there were 24,696 votes by proxy cards, the validity of which Booker, et al do challenge. (R. 34 and 35).

As stated, however, if the nominating by-law was Constitutional and valid, then the question of the validity of the so-called proxy cars is completely immaterial and would have no control over the decision.

Proxy Cards

As stated, an attack is made upon the validity of the proxy cards given by the members which would be immaterial if the foregoing nominating by-law is valid. However, it is respectfully submitted that the proxy cards are entirely valid. The proxy feature reads as follows:

"The official Proxy Committee of the Institution is authorized *in my absence* to cast my vote or votes at any meeting of the members from year to year until this proxy is *cancelled* in writing." R. 13, 17). (Emphasis added)

It is alleged that the proxies are invalid as they are not "to two or more persons" in violation of Section 22-1863 of the Code of Georgia. Neither this Code Section nor any other law of Georgia so provides. Actually, the Section does provide that any stockholder may "vote by proxy or proxies."

"22-1863. *Proxies*. At any meeting of the stockholders of any corporation any stockholder of record may be represented and vote by proxy or proxies appointed by an instrument in writing. If such instrument in writing shall designate two or more persons to act as proxies, a majority of such persons present at the meeting, or, if only one shall be present, then that one shall have and may exercise all of the powers conferred by such written instrument upon all of the persons so designated unless the instrument shall otherwise provide."

It is contended that this proxy is for an unlimited time, yet the proxy is cancellable at will, and is of no effect if the member attends the meeting.

No decision (Georgia or otherwise) is cited to sustain the proposition that such a revocable proxy is invalid. In fact, the only decisions cited in the Court below dealt with "irrevocable proxies," and hence were not in point.

It is alleged that these proxy cards were invalid as the members did not know what they were signing.

The law of Georgia and the general law is that a party of full age and capacity is presumed to know what he signs and cannot repudiate his act unless he can show that he is suffering under a disability, that fraud has been practiced upon him, or a legal duress. No such claim is made.

It is suggested in the original Petition that the proxy card itself discloses an effort to hide the proxy feature from the signer. A reference to the card (R-13) shows this to be completely unfounded. At the very beginning of the card is the caption with the words:

"containing proxy authorization."

In the body of the card are four lines, in the same size letters as the rest, making the appointment of a proxy and outlining the terms of same in words any one can understand.

It is claimed that the proxy card denies "to members the right to vote for persons of their choice" when as a matter of fact, it specifically reserves to the members the right to vote either in person or by a new proxy revoking the old.

It attacks the proxies because they are "for an indefinite number of votes, yet the by-laws of the Association of which each is a member specifically sets out the method of mathematically determining the number of votes each member may cast. (R-9).

It claims that the proxy is vague, and that the powers are not named. The reading of the proxy, however, shows the fallacy of this attack.

". . . in my absence, to cast my vote or votes at any meeting of the members."

At this point it should be stressed that the Petition only attacks the so-called proxy cards addressed to the Committee, yet the record shows that there were *719* votes in favor of the elected directors, 341 votes by persons present and 378 votes by written proxies (other than the proxy cards) appointing an individual as proxy. As stated, these votes are not attacked.

Place of Meeting

The Petition below complains that the meeting should not have been held at the offices of First Federal as they were too small and they were crowded.

A sufficient answer to this is that the by-laws of the Association provide that the meeting must be held at the home office. (R. 10, 4). The notice for such meeting must be advertised a certain length ahead of time. This was where the meeting had to be held. If the persons who are seeking to upset this election considered that this was an improper place to hold the meeting, they should have made such a motion at the previous meeting of the Board of Directors so that a resolution could have been adopted and proper notice could have been advertised. It is significant that of the persons attacking the election, one had been Chairman of the Board and several of the others directors, thoroughly familiar with the by-laws of the Association.

Answering Specially
Purpose

The purpose for which Petitioners seek the writ of certiorari is correctly stated in paragraph 1.

Statement of Case Not Concise and Introduces Two Attacks Not Presented Below

Answering paragraphs 2 through 15 inclusive and 17, respondent says that these paragraphs do set forth

almost verbatim a statement of the allegations of the Petition in the Superior Court. It correctly states the contents of such Petition, but certainly not concisely.

Paragraph 16 for the first time, since this case started brings in the 14th Amendment.

Paragraphs 18 and 19 also desert the 5th Amendment in favor of the 14th Amendment and for a second brand new attack on the by-laws and proxies, these paragraphs allege for the first time that the nominating by-law and the proxy are unconstitutional as they attempt to illegally perpetuate the officers in office. No such attack was made in either Court below.

Record Confused

Answering paragraph 20 the respondent says that a copy of the ruling of the Judge of the Superior Court sustaining the demurrers and dismissing the Petition is not in the record, but this is unimportant as the ruling contains no opinion, but merely orders the demurrers sustained and the Petition dismissed. However, there is not appended to the Petition for Certiorari a copy of the judgment to the Supreme Court of Georgia as required by Rule 23 (1) J.

Contentions of Petitioner

Answering paragraph 21 Respondent says that same correctly states Petitioners' contentions although it is denied that they are correct.

Opinion State Court Not Appended

Answering paragraph 22, Respondent agrees that it properly presents question for consideration although Respondent denies that there is any merit in same. As stated, the opinion is not appended to the Petition

for Certiorari as required although it is a part of some typewritten sheets handed Respondent which is the only record received. This is a serious omission as a reading of the opinion would carry conviction of its soundness with it. We have supplied this deficiency by quoting liberally from it in previous part of this Brief.

No Motion Rehearing

Answering paragraph 23, the Respondent says that a final decision has been rendered, but denies that all remedies have been exhausted, as no motion was filed in said Supreme Court of the State of Georgia for a rehearing.

Substance of Question

With reference to the allegations that the State Court has decided "a federal question of substance not theretofore determined by this Court," this is respectfully denied.

The Supreme Court of the United States has recognized in *Rogers vs. Hill*, 289 U. S. 588 that the general law with reference to Corporate by-laws is that:

> "Power to prescribe rules for the government of business corporations reasonably is deemed an incident of ownership, and the voting power of the shares."

Where the Supreme Court has considered corporate by-laws, it has determined that these are not federal questions, but that they are determined by the law of the State in which the Corporation is domiciled.

It is further submitted that the decision of the Supreme Court of Georgia sustaining the reasonableness and validity of the nominating by-law conforms

to the law generally on such subjects throughout the United States, and is certainly not contrary to any applicable decision of the Supreme Court of the United States.

We have already pointed out several reasons why the writ of certiorari should not be granted and conclude by submitting that the only Federal question involved deals with the nominating by-law, which seems reasonable and proper for the operation of a Federal and Savings Loan Association and there is no substance in the attack thereon.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, ..., one of the attorneys of record for Petitioners, acknowledge receipt of 3 copies of the foregoing brief.

This ..... day of November, 1959.

.....

CORRECTION

Since the preparation of this answer and brief, Petitioners have filed an Appendix to the Petition setting forth the opinion of the Supreme Court of Georgia.